Supreme Court, U.S.
FILED
MAR - 6 2015
OFFICE OF THE CLERK

Nos. 14-556, 14-562, 14-571, 14-574

In The
Supreme Court of the United States

JAMES OBERGEFELL, ET AL., *Petitioners*,
v.
RICHARD HODGES, ET AL., *Respondents*.

VALERIA TANCO, ET AL., *Petitioners*,
v.
WILLIAM EDWARD "BILL" HASLAM, ET AL., *Respondents*.

APRIL DEBOER, ET AL., *Petitioners*,
v.
RICHARD SNYDER, ET AL., *Respondents*.

GREGORY BOURKE, ET AL., *Petitioners*,
v.
STEVE BESHEAR, ET AL., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
DAVID H. GANS
JUDITH E. SCHAEFFER
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th St., NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org
Counsel for Amicus Curiae

March 6, 2015

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	5
I. THE TEXT AND HISTORY OF THE SUPREMACY CLAUSE GIVE COURTS THE DUTY TO ENFORCE THE CONSTITUTION'S SUPREMACY OVER ALL FORMS OF STATE LAW AND PROHIBIT STATE MAJORITIES FROM VIOLATING CONSTITUTIONAL GUARANTEES	5
II. THE TEXT AND HISTORY OF THE EQUAL PROTECTION CLAUSE GUARANTEE EQUALITY UNDER THE LAW AND LIMIT THE POWER OF MAJORITIES IN THE STATES TO DENY EQUAL RIGHTS TO MINORITIES	11
III. THIS COURT HAS CONSISTENTLY HELD THAT FUNDAMENTAL CONSTITUTIONAL PROTECTIONS ARE NOT SUBJECT TO A VOTE.	20
CONCLUSION	24

TABLE OF AUTHORITIES

Page(s)

Cases

Ariz. Free Enter.'s Freedom Club PAC v. Bennett,
131 S. Ct. 2806 (2011) 21

Baskin v. Bogin,
766 F.3d 648 (7th Cir. 2014), *cert. denied*,
135 S. Ct. 316 (2014) 3, 24

Bond v. United States,
131 S. Ct. 2355 (2011) 4

Bostic v. Schaefer,
760 F.3d 352 (4th Cir. 2014), *cert. denied*,
135 S. Ct. 308 (2014) 24

Brown v. Bd. of Educ.,
347 U.S. 483 (1954) 4, 14

City of Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985) 4

Civil Rights Cases,
109 U.S. 3 (1883) 13

DeBoer v. Snyder,
772 F.3d 388 (6th Cir. 2014) 2, 4, 14, 22

District of Columbia v. Heller,
554 U.S. 570 (2008) 14

Gibbons v. Ogden,
22 U.S. 1 (1824) 14

TABLE OF AUTHORITIES – cont'd.

Page(s)

Ho Ah Kow v. Nunan,
12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6,456) 13

J.E.B. v. Alabama ex rel. T.B.,
511 U.S. 127 (1994) 14, 15

Kirchberg v. Feenstra,
450 U.S. 455 (1981) 4

Kitchen v. Herbert,
755 F.3d 1193 (10th Cir. 2014), *cert denied*, 135 S. Ct. 265 (2014) 24

Latta v. Otter,
771 F.3d 456 (9th Cir. 2014) 3, 24

Lawrence v. Texas,
539 U.S. 558 (2003) 14

Levy v. Louisiana,
391 U.S. 68 (1968) 4

Loving v. Virginia,
388 U.S. 1 (1967) 4, 5, 14

Lucas v. Forty-Fourth Gen. Assembly,
377 U.S. 713 (1964) 20, 21

M.L.B. v. S.L.J.,
519 U.S. 102 (1996) 5

Marbury v. Madison,
5 U.S. 137 (1803) 11

TABLE OF AUTHORITIES – cont'd.

Page(s)

McDonald v. City of Chicago,
561 U.S. 742 (2010) 11, 16, 17

Metro. Life Ins. Co. v. Ward,
470 U.S. 869 (1985) 4

Orr v. Orr,
440 U.S. 268 (1979) 4

Paul v. Virginia,
75 U.S. (8 Wall.) 168 (1868) 8

Reed v. Reed,
404 U.S. 71 (1971) 4

Romer v. Evans,
517 U.S. 620 (1996) 13, 21

Schuette v. Coal. to Defend Affirmative Action,
134 S. Ct. 1623 (2014) 22

Shaw v. Reno,
509 U.S. 630 (1993) 4

Strauder v. West Virginia,
100 U.S. 303 (1880) 15

United States v. Windsor,
133 S. Ct. 2675 (2013) 4, 12, 13, 23, 24

W.Va. State Bd. of Educ. v. Barnette,
319 U.S. 624 (1943) 3, 20

Yick Wo. v. Hopkins,
118 U.S. 356 (1886) 12

TABLE OF AUTHORITIES – cont'd.

Page(s)

Zablocki v. Redhail, 434 U.S. 374 (1978) 4

Constitutional Provisions and Legislative Materials

1 Annals of Cong. (1789) 11

1 *The Records of the Federal Convention of 1787* (Max Farrand ed., 1911) 7

2 *The Records of the Federal Convention of 1787* (Max Farrand ed., 1911) 9

3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., 1836) 10

Articles of Confederation of 1781, art. III 6

Cong. Globe, 39th Cong., 1st Sess. (1866) 12, 13, 17, 18, 20

Cong. Globe, 41st Cong., 2nd Sess. (1870) 18

Enforcement Act of 1870, 16 Stat. 140 (1870) 18

Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess. (1866) 12, 17

U.S. Const. art. VI, cl. 2 6

Books, Articles, and Other Authorities

Akhil Reed Amar, *America's Constitution: A Biography* (2005) 8

TABLE OF AUTHORITIES – cont'd.

Page(s)

Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425 (1987) 9

Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998) 15

Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865-1867* (1914) 15

Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 5 (1949) 19

Chi. Trib., Aug. 2, 1866 19

Cincinnati Com., June 21, 1866 19

Cincinnati Com., Aug. 20, 1866 19

Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969) 6

James Madison, *Vices of the Political System of the United States* (Apr. 1787), *in* 9 *The Papers of James Madison* 345 (Robert A. Rutland & William M. E. Rachal eds., 1975) 6, 7

John Locke, *Second Treatise of Government* (C. B. Macpherson ed., Hackett Publishing 1980) (1690) 16

TABLE OF AUTHORITIES – cont'd.

Page(s)

Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 Loy. L.A. L. Rev. 1159 (1992) 3

Steven G. Calabresi, Note, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 Yale L.J. 1403 (1982) 8

Steven G. Calabresi & Hannah Begley, *Originalism and Same-Sex Marriage* (2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2509443 16

Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 Nw. U. L. Rev. 663 (2009) 14

The Federalist No. 10 (James Madison) (Clinton Rossiter ed., 1961) 2, 7

The Federalist No. 44 (James Madison) (Clinton Rossiter ed., 1961) 7, 9

The Federalist No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 7, 10

The Federalist No. 80 (Alexander Hamilton) (Clinton Rossiter ed., 1961) 8

INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights, freedoms, and structural safeguards that our nation's charter guarantees. CAC accordingly has a strong interest in this case and in the scope of the Fourteenth Amendment's protections for liberty and equality. CAC previously filed *amicus curiae* briefs in this Court in *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), and *United States v. Windsor*, 133 S. Ct. 2675 (2013).

INTRODUCTION AND SUMMARY OF ARGUMENT

Fundamental constitutional principles that protect the liberty, equal dignity, and rights of all persons are not subject to a popular vote. The court of appeals thought otherwise. Advancing a crabbed understanding of the constitutional guarantee of equal protection and a faulty understanding of federalism, the court of appeals upheld state laws and constitutional amendments adopted by the voters of Kentucky, Ohio, Michigan, and Tennessee that deny to

---

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

loving, committed same-sex couples the freedom to marry. Invoking "[t]he States' undoubted power over marriage," *DeBoer v. Snyder*, 772 F.3d 388, 415 (6th Cir. 2014), the court of appeals concluded that it is "in the hands of state voters," *id.* at 403, whether to treat gay men and lesbians as second-class persons, unworthy of having their loving relationships recognized.[2] This flawed reasoning turns the Constitution on its head, empowering the people of the states to use the democratic process to oppress disfavored minorities. That cannot be squared either with the essential meaning of the constitutional guarantee of equal protection of the laws or with principles of constitutional supremacy going back to the Founding.

Preventing tyranny of the majority at the state level has been a consistent theme of our Constitution from the Founding on. At the Founding, our Constitution's drafters had seen numerous abuses of power by factions controlling state governments, and included in the Constitution a number of specific limits on states designed to ensure that "the majority" would be "unable to concert and carry into effect schemes of oppression." *The Federalist No. 10*, at 49 (James Madison) (Clinton Rossiter ed., 1961). Seventy years later, in the wake of a bloody Civil War fought over slavery, the American people ratified the Fourteenth Amendment and added sweeping new

---

[2] The court of appeals relied on different reasoning in rejecting plaintiffs' arguments that the same-sex marriage bans offend the substantive liberty guarantees of the Fourteenth Amendment. *See id.* at 411 ("[T]he right to marry in general, and the right to gay marriage in particular, nowhere appear in the Constitution."). In this brief, *amicus* focuses on the errors in the court's equal protection analysis, demonstrating that the lower court's analysis misread the equal protection guarantee and cannot be squared with principles of constitutional supremacy.

limits on state action to the Constitution. The Fourteenth Amendment guarantees fundamental rights and outlaws discrimination against all persons, preventing legislative or popular majorities from oppressing disfavored individuals. By requiring states to honor basic constitutional values, "[t]he advocates of the Fourteenth Amendment stood in the shoes of the advocates of the Constitution of 1787." Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 Loy. L.A. L. Rev. 1159, 1168 (1992). As history shows, "a primary purpose of the Constitution is to protect minorities from oppression by majorities." *Latta v. Otter*, 771 F.3d 456, 474 (9th Cir. 2014). As our Constitution provides, "[m]inorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law." *Baskin v. Bogin*, 766 F.3d 648, 671 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014).

Consistent with these first principles, this Court has repeatedly recognized that constitutional guarantees that protect the individual from abuse by the government cannot be left to the democratic process. Under our constitutional scheme, "[o]ne's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). Indeed, if majority approval were enough to make state-sponsored discrimination constitutional, the Fourteenth Amendment would be a dead letter.

No one doubts, as the court of appeals recognized, that "[p]rocess and structure matter greatly in American government" and that federalism "permits

laboratories of experimentation . . . allowing one State to innovate one way, another State another, and a third State to assess the trial and error over time." *DeBoer*, 772 F.3d at 396, 406. Indeed, federalism "is more than an exercise in setting the boundary between different institutions of government for their own integrity. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (citations and internal quotation marks omitted).

But where constitutional limits apply, state prerogatives necessarily end. As a long line of this Court's cases make clear, even when states act in an indisputably state sphere, they cannot use the democratic process to write inequality into law or deny to minorities core aspects of liberty. *See United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) ("[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons"); *Shaw v. Reno*, 509 U.S. 630 (1993) (same regarding legislative redistricting); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (same regarding land use regulations); *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (same regarding taxation); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (same regarding marital property rights); *Orr v. Orr*, 440 U.S. 268 (1979) (same regarding divorce law); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (same regarding marriage); *Reed v. Reed*, 404 U.S. 71 (1971) (same regarding estates law); *Levy v. Louisiana*, 391 U.S. 68 (1968) (same regarding family law); *Loving v. Virginia*, 388 U.S. 1 (1967) (same regarding marriage); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (same regarding education).

There is no "marriage exception" to the Fourteenth Amendment's guarantee of equality under the law. On the contrary, as this Court has stated, the right to marry is "one of the vital personal rights essential to the orderly pursuit of happiness," *Loving*, 388 U.S. at 12, and is "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996).

Equal rights under law is not a policy preference to be weighed by the voters; it is a constitutional mandate inscribed in the text of the Fourteenth Amendment. By deferring to the "democratic process" and empowering the people of a state to impose a class-based badge of inferiority on loving, committed same-sex couples and their children, the court of appeals misapprehended the Fourteenth Amendment's guarantee of equal protection—which protects all persons from state-sponsored discrimination, including the petitioners in these cases and all other gay men and lesbians who wish to exercise their right to marry—and disregarded vital principles of constitutional supremacy.

ARGUMENT

I. THE TEXT AND HISTORY OF THE SUPREMACY CLAUSE GIVE COURTS THE DUTY TO ENFORCE THE CONSTITUTION'S SUPREMACY OVER ALL FORMS OF STATE LAW AND PROHIBIT STATE MAJORITIES FROM VIOLATING CONSTITUTIONAL GUARANTEES.

Even with a vibrant federalism at its heart, the Constitution was written against the backdrop of abuse of the democratic process in the states. The ratification of the Constitution, as Gordon Wood has

observed, was "more than a response to the obvious weaknesses of the Articles of Confederation. It became as well an answer to the problems of the state governments." Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, at 467 (1969).

The drafters of our Constitution were acutely aware of legal wrongs by state governments under the Articles of Confederation, which established a loose confederacy built on a "firm league of friendship" between thirteen independent states (*see* Articles of Confederation of 1781, art. III), and wrote the Constitution to impose checks on the power of governing majorities in the states. The Framers deliberately made the Constitution "the supreme Law of the Land," superior in force to "any Thing in the Constitution or Laws of any State to the Contrary." U.S. Const. art. VI, cl. 2. By including in the Constitution a sweeping declaration of constitutional supremacy, the Framers firmly rejected the notion that federal constitutional guarantees should be left to the democratic process and decided by the people of the states.

The Framers had witnessed numerous abuses of state authority under the Articles of Confederation, which established a single branch of the federal government, but contained no mechanism for ensuring federal supremacy. As James Madison described it, the "vices" of government under the Articles were many: "[f]ailure of the States to comply with the Constitutional requisitions"; "[e]ncroachments by the States on the federal authority"; "[v]iolations of the laws of nations and of treaties"; "[t]respasses of the States on the rights of each other"; "[i]njustice of the laws of States." James Madison, *Vices of the Political System of the United States* (Apr. 1787), *in* 9 *The Papers of James Madison* 345, 348, 349, 354 (Robert A. Rutland & William M. E. Rachal eds., 1975). The

Framers gathered together in Philadelphia in 1787 to correct these "vices" resulting from the lack of "effectual controul in the whole over its parts." 1 *The Records of the Federal Convention of 1787*, at 167 (Max Farrand ed., 1911) [hereinafter *Farrand's Records*].

The actions of state governments under the Articles illustrated to the Framers the dangers of factions and the need for constitutional checks to limit the power of majorities in the states. As Madison explained in Federalist 10, "measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority." *The Federalist No. 10*, *supra*, at 45 (James Madison). Madison observed that "[w]hen a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens." *Id.* at 48. What Madison had seen in the states called "into question the fundamental principle of republican Government, that the majority who rule in such Governments, are the safest Guardians both of public Good and of private rights." James Madison, *Vices of the Political System of the United States*, *in* 9 *The Papers of James Madison*, *supra*, at 354.

Concerned that majorities in the states would trample on the rights of "the minor party in the community," *The Federalist No. 78*, *supra*, at 437 (Alexander Hamilton), and that "additional fences" were needed to protect "personal security and private rights," *The Federalist No. 44*, *supra*, at 250 (James Madison), the Constitution went to great lengths to check abuses of power by state authority. To that end, Article I, Section 10 of the Constitution forbids states from enacting bills of attainder or ex post facto laws, or impairing the obligations of contracts in or-

der "to prevent state legislatures from exploiting citizens of sister states and foreigners" and "to prevent state lawmakers from ganging up on a minority of their own citizens—in-state creditors, to be specific." Akhil Reed Amar, *America's Constitution: A Biography* 123 (2005); *see also* Steven G. Calabresi, Note, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 Yale L.J. 1403, 1423 (1982) (explaining that the Contracts Clause "served to protect a minority from majoritarian politics at the state level"). Here, "the federal Constitution would in some cases insinuate itself between a state and its own citizens." Amar, *America's Constitution: A Biography*, *supra*, at 124.

Along similar lines, Article IV's Privileges and Immunities Clause prohibited states from discriminating against residents of other states. Factions in a state could not use state authority to disadvantage outsiders. Described by Alexander Hamilton as the "basis of the Union," the Clause was designed to ensure the "inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled." *The Federalist No. 80*, *supra*, at 446 (Alexander Hamilton). *See Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868) ("[W]ithout some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.").

Even more important than these specific protections against state violation of personal, individual rights, the Supremacy Clause declared the Constitution to be the "supreme Law of the Land," rendering "any Thing in the Constitution or Laws of any State

to the Contrary" null and void. Simply put, the people of a state could not choose to adopt a state Constitution, or state laws, that transgressed the federal Constitution, federal laws, or treaties. Without a supreme federal power overseeing the states, James Madison argued, our system of government would be a "monster, in which the head was under the direction of the members." *The Federalist No. 44*, *supra*, at 255 (James Madison).

The Framers chose to make this declaration of the Constitution's supremacy exceptionally broad in scope, rendering null and void all forms of state action inconsistent with the Constitution, federal laws, and treaties. As initially introduced by Anti-Federalist Luther Martin, the Supremacy Clause was anemic: Martin's proposal did not establish the Constitution as the supreme law of the land and would have allowed the people of a state to adopt a state constitution that conflicted with the federal Constitution. *See* 2 *Farrand's Records*, *supra*, at 28-29; Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1458 (1987) (noting that "when the supremacy clause was first introduced at Philadelphia . . . it pointedly failed to specify the supremacy of the federal Constitution over its state counterparts"). Fortunately, the Framers recognized that such a system of government would have "inver[ted] . . . the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts," *The Federalist No. 44*, *supra*, at 255 (James Madison), and they decisively rejected it. In contrast to Martin's initial proposal, the final form of the Supremacy Clause written into our Founding charter "[i]s continental: one Constitution, one land, one People." Amar, *Of Sovereignty and Federalism*, *supra*, at 1458.

To ensure the Constitution's supremacy not merely on paper but in fact, the Framers gave federal courts the duty to enforce the Constitution's commands and maintain the rule of law in justiciable cases before them. The Framers understood that constitutional "[l]imitations . . . can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." *The Federalist No. 78*, *supra*, at 434 (Alexander Hamilton). "[C]ourts of justice" would function as "bulwarks of a limited Constitution," and "guard the Constitution and the rights of individuals" from "designing men" who have a "tendency . . . to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community." *Id.* at 437. As John Marshall observed, "[t]o what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection." 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 554 (Jonathan Elliot ed., 1836). The Constitution's Framers concluded that judicial review by independent judges was essential to preserve freedom and prevent majorities from abusing their power.

In 1789, during the debates over the Bill of Rights, the Founders reaffirmed the judiciary's critical role in ensuring constitutional supremacy and vindicating individual rights. As James Madison explained, "[i]f [the Bill of Rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardi-

ans of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." 1 Annals of Cong. 457 (1789). Judicial review was the key to ensuring that the guarantees contained in the Bill of Rights were not "paper barriers . . . too weak to be worthy of attention," *id.* at 455, but rather that they established real, enforceable limits on the power of government that would operate "against the majority in favor of the minority." *Id.* at 454.

Ever since *Marbury v. Madison*, 5 U.S. 137 (1803), it has been recognized that it is the role of courts to limit the power of majorities to violate constitutional protections designed to guarantee the rights of all. As *Marbury* affirmed, enforcing the Constitution's guarantees is "the very essence of judicial duty" and necessary to ensure the Constitution's status as "the fundamental and paramount law of the nation." *Id.* at 177-78. The court of appeals here abdicated its constitutional responsibility to enforce the Constitution's supremacy over all forms of state law.

II. THE TEXT AND HISTORY OF THE EQUAL PROTECTION CLAUSE GUARANTEE EQUALITY UNDER THE LAW AND LIMIT THE POWER OF MAJORITIES IN THE STATES TO DENY EQUAL RIGHTS TO MINORITIES.

The original Constitution's limits on state governments proved insufficient to secure liberty and equality. Accordingly, nearly 70 years later, "[t]he constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system," *McDonald v. City of Chicago*, 561 U.S. 742, 754 (2010). These Amendments added to

the Constitution sweeping new limits on state governments designed to secure "the civil rights and privileges of all citizens in all parts of the republic," *see Report of the Joint Committee on Reconstruction*, 39th Cong., 1st Sess., at xxi (1866), and keep "whatever sovereignty [a State] may have in harmony with a republican form of government and the Constitution of the country." Cong. Globe, 39th Cong., 1st Sess. 1088 (1866). For the first time in history, the Constitution guaranteed the equal protection of the laws to all persons, forbidding legislative or popular majorities in the states from discriminating against disfavored minorities. With the ratification of the Fourteenth Amendment, equal rights under *state* law were constitutionally guaranteed and not subject to a popular vote.

The court of appeals lost sight of these foundational equal protection principles, empowering the people of a state to "disparage and to injure" loving, committed same-sex couples, "whose moral and sexual choices the Constitution protects." *Windsor*, 133 S. Ct. at 2696, 2694. That is a majoritarian bridge too far. While the people of a state may, of course, create laws in the mine run of cases—whether through legislation or ballot measures—they cannot contravene the Fourteenth Amendment's guarantee of equality of rights under the law.

The plain text of the Fourteenth Amendment, which prohibits a state from denying to "any person" the "equal protection of the laws," establishes a broad guarantee of equality for all persons. It secures the same rights and same protection under the law for all men and women, of any race, whether young or old, citizen or alien, gay or straight. *See Yick Wo. v. Hopkins*, 118 U.S. 356, 369 (1886) ("These provisions are universal in their application, to all persons within

the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ."); *Civil Rights Cases*, 109 U.S. 3, 24 (1883) ("The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws."). As history shows, the original meaning of the equal protection guarantee "establishes equality before the law," Cong. Globe, 39th Cong., 1st Sess. 2766 (1866), "abolishes all class legislation in the States[,] and does away with the injustice of subjecting one caste of persons to a code not applicable to another." *Id.* The meaning of equal protection, as the debates over the Fourteenth Amendment show, was that the "law which operated upon one man shall operate *equally* upon all," *id.* at 2459 (emphasis in original), thereby "securing an equality of rights to all citizens of the United States, and of all persons within their jurisdiction." *Id.* at 2502.

No person, under the Fourteenth Amendment's text, may be consigned to the status of a pariah, "a stranger to [the State's] laws." *Romer v. Evans*, 517 U.S. 620, 635 (1996). Under the Equal Protection Clause, states may not deny to gay men or lesbians rights basic to "ordinary civic life in a free society," *id.* at 631, "to make them unequal to everyone else." *Id.* at 635. Quite plainly, the Equal Protection Clause protects minorities from state-sponsored discrimination at the hands of majorities, "withdraw[ing] from Government the power to degrade or demean," *Windsor*, 133 S. Ct. at 2695, through the democratic process. *See also Civil Rights Cases*, 109 U.S. at 24 ("[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment . . . ."); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 256 (C.C.D. Cal. 1879)

(No. 6,456) (Field, C.J.) ("[H]ostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form . . . is forbidden by the fourteenth amendment . . . .").

Rather than interpret the text in light of its original meaning, the court of appeals emphasized what it thought was the expectation of the American people in 1868, asserting that "the people who adopted the Fourteenth Amendment [never] understood it to require the States to change the definition of marriage." *DeBoer*, 772 F.3d at 403. This basic mode of analysis is flawed. As a written charter establishing fundamental principles of government, the proper interpretation of the Constitution turns on the meaning of the text, *see, e.g.*, *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824); *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008), not the particular subjective expectations of the lawmakers in Congress or the people in the states who ratified the document. *See, e.g.*, *Brown*, 347 U.S. 483; *Loving*, 388 U.S. 1; *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *Lawrence v. Texas*, 539 U.S. 558 (2003). This, ultimately, is what ensures that we are a nation of laws, not men. "What judges must be faithful to is the enacted law, not the expectations of the parties who wrote the law. . . . [I]t is the text of the Fourteenth Amendment that was ratified in 1868." Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 Nw. U. L. Rev. 663, 669 (2009).

That text was written in the broadest possible terms. As this Court observed in one of its first decisions interpreting the Amendment, "[t]he Fourteenth Amendment makes no attempt to enumerate the rights it [is] designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition im-

plies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property." *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880).

This broad wording was no accident. When the 39th Congress designed the Fourteenth Amendment, it chose universal language specifically intended to secure equal rights for *all*. While the Amendment was written and ratified in the aftermath of the Civil War and the end of slavery, it protects all persons. "[S]ection 1 pointedly spoke not of race but of more general liberty and equality." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 260-61 n.* (1998). Indeed, the Reconstruction-Era Framers specifically considered and rejected proposed constitutional language that would have outlawed racial discrimination and nothing else. *See* Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865-1867*, at 46, 50, 83 (1914), preferring a universal guarantee of equality that secured equal rights to all persons. Whether the proposals were broad in scope or were narrowly drafted to prohibit racial discrimination in civil rights, the Framers of the Fourteenth Amendment consistently rejected limiting the Amendment's equality guarantee to racial discrimination. *See J.E.B.*, 511 U.S. at 151 (Kennedy, J., concurring) ("Though in some initial drafts the Fourteenth Amendment was written to prohibit discrimination against 'persons because of race, color or previous condition of servitude,' the Amendment submitted for consideration and later ratified contained more comprehensive terms . . . ."). The Fourteenth Amendment's "neutral phrasing," "extending its guarantee to 'any person,'" *id.* at 152 (Kennedy, J., concurring), was intended to secure equal rights for all.

In guaranteeing the equal protection of the laws to all persons, the Framers of the Fourteenth Amendment wrote into our nation's charter a principle with deep roots in our constitutional heritage. The idea of equality under the law was reflected in the 17th century writings of John Locke that profoundly influenced the Founding generation, see John Locke, *Second Treatise of Government*, § 142, at 75 (C. B. Macpherson ed., Hackett Publishing 1980) (1690) ("They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at court, and the country man at plough.") It formed the centerpiece of the Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."), and was included in numerous Founding-era state constitutions. *See* Steven G. Calabresi & Hannah Begley, *Originalism and Same-Sex Marriage*, at 5-9 (2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2509443 (collecting state constitutional provisions).

The Fourteenth Amendment's Framers crafted a broad guarantee of equality for all persons to bring the Constitution back into line with these fundamental principles of American equality, which had been betrayed and stunted by the institution of slavery. *See McDonald*, 561 U.S. at 807 (Thomas, J., concurring) ("[S]lavery, and the measures designed to protect it, were irreconcilable with the principles of equality . . . and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure."). After nearly a century in which the Constitution sanctioned racial slavery and

allowed all manner of state-sponsored discrimination, the Fourteenth Amendment codified our founding promise of equality through the text of the Equal Protection Clause. As the Amendment's Framers explained time and again, the guarantee of the equal protection of the laws was "essentially declared in the Declaration of Independence," Cong. Globe, 39th Cong., 1st Sess. 2961 (1866), and was necessary to secure the promise of liberty for all persons. "How can he have and enjoy equal rights of 'life, liberty, and the pursuit of happiness' without 'equal protection of the laws?' This is so self-evident and just that no man . . . can fail to see and appreciate it." *Id.* at 2539.

The Framers of the Fourteenth Amendment acted from experience as well. They had seen firsthand that states could not be trusted to respect fundamental liberties or basic notions of equality under the law for all persons. *See Report of the Joint Committee on Reconstruction*, *supra*, at xvii (detailing findings that, in the aftermath of the war, Southern people refused "to place the colored race . . . upon terms even of civil equality" or "tolerat[e] . . . any class of people friendly to the Union, be they white or black"). White Unionists, no less than the newly freed slaves, needed the equal protection of the laws to ensure that Southern state governments respected their fundamental rights. *See McDonald*, 561 U.S. at 779 (discussing the "plight of whites in the South who opposed the Black Codes"); Cong. Globe, 39th Cong., 1st Sess. 1093 (1866) ("The adoption of this amendment is essential to the protection of the Union men" who "will have no security in the future except by force of national laws giving them protection against those who have been in arms against them."); *id.* at 1263 ("[W]hite men . . . have been driven from their homes,

and have had their lands confiscated in State courts, under State laws, for the crime of loyalty to their country . . . .").

In addition, the Framers recognized that immigrants, who faced pervasive discrimination in the Western United States, needed the protection of equal laws as well. Congressman John Bingham, one of those responsible for drafting the Fourteenth Amendment, demanded that "all persons, whether citizens or strangers, within this land . . . have equal protection in every State in this Union in the rights of life and liberty and property[.]" Cong. Globe, 39th Cong., 1st Sess. 1090 (1866). Indeed, in 1870, two years after the Fourteenth Amendment's ratification, Congress used its express constitutional power to enforce the Amendment's guarantee of equality under the law to all persons by passing the Enforcement Act of 1870. This Act secured to "all persons within the jurisdiction of the United States" the "same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens," and protected against the "deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien." Enforcement Act of 1870, 16 Stat. 140, 144 (1870); Cong. Globe, 41st Cong., 2nd Sess. 3658 (1870) ("[W]e will protect Chinese aliens or any other aliens whom we allow to come here, . . .; let them be protected by all the laws and the same laws that other men are."); *id.* at 3871 (observing that "immigrants" were "persons within the express words" of the Fourteenth Amendment "entitled to the equal protection of the laws").

The Framers' experience with these many forms of state-sponsored discrimination confirmed what James Madison had so elegantly described in Federalist 10: rule by factions in the states was incompatible with constitutional protections of liberty and equality for all. In order to prevent these sorts of past abuses, and new ones arising after the Civil War, the Fourteenth Amendment "put in the fundamental law the declaration that all citizens were entitled to equal rights in this Republic," Chi. Trib., Aug. 2, 1866, at 2, placing all "throughout the land upon the same footing of equality before the law, in order to prevent unequal legislation." Cincinnati Com., Aug. 20, 1866, at 2; "With this section engrafted upon the Constitution, it will be impossible for any Legislature to enact special codes for one class of its citizens . . . ." Cincinnati Com., June 21, 1866, at 4; *see* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 Stan. L. Rev. 5, 72-75 (1949) (discussing press coverage of Fourteenth Amendment).

In short, in a manifest departure from antebellum conceptions of federalism, the Fourteenth Amendment established equality under the law and equality of rights for all persons as a constitutional mandate, forbidding the people of a state from using the democratic process to subject minorities to adverse, discriminatory treatment and take away their fundamental rights. The lower court's contrary conclusion is sharply at odds with the Fourteenth Amendment's text and history. Under the Amendment's plain text and original meaning, this sweeping, universal guarantee of equality applies to the petitioners in these cases and to all others who wish to exercise the right to marry the person of their choice. The Equal Protection Clause guarantees

equality under the law and equality of rights to all persons, including the right to marry, a right recognized by the Framers as part of the "attributes of a freeman according to the universal understanding of the American people[.]" Cong. Globe, 39th Cong., 1st Sess. 504 (1866); *see also id.* at 343 (explaining that the "poor man, whose wife may be dressed in a cheap calico, is as much entitled to have her protected by equal law as is the rich man to have his jeweled bride protected by the laws of the land").

III. THIS COURT HAS CONSISTENTLY HELD THAT FUNDAMENTAL CONSTITUTIONAL PROTECTIONS ARE NOT SUBJECT TO A VOTE.

Consistent with the Constitution's text and history, this Court has repeatedly rejected the notion that the people of the states may use the democratic process to make an end-run around the Constitution's individual-rights guarantees. Under our constitutional scheme, "[o]ne's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Barnette*, 319 U.S. at 638. The Fourteenth Amendment guarantees of personal, individual rights limit the states, whether state action is in the form of a legislative act or a state law or constitutional amendment adopted by the voters of a state. As the Supremacy Clause makes clear, the Constitution is supreme over state law in all its forms. That the people of Kentucky, Michigan, Ohio, and Tennessee acted through the democratic process here does not justify applying a watered-down version of the equal protection guarantee.

This Court has recognized this principle many times. In *Lucas v. Forty-Fourth General Assembly*,

377 U.S. 713 (1964), the Court easily dispatched the argument that a reapportionment plan that violated the constitutional principle of one person-one vote contained in the Equal Protection Clause could be upheld because it was approved by the voters. Explaining that "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be," *id.* at 736-37, the Court held that the fact that the reapportionment plan was adopted by the voters rather than enacted by the legislature was "without federal constitutional significance." *Id.* at 737. In *Romer v. Evans*, the Court struck down a state constitutional amendment adopted by the voters of Colorado as a violation of the equal protection guarantee, concluding that the voter-approved constitutional amendment denied gay men and lesbians rights basic to "ordinary civic life in a free society" in order "to make them unequal to everyone else." 517 U.S. at 631, 635. This, Justice Kennedy explained, "Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws." *Id.* at 635.

More recently, in *Arizona Free Enterprise's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011), the Court struck down an Arizona campaign finance statute adopted by the voters, concluding that the measure unduly burdened political speech without sufficient justification. As Chief Justice Roberts explained, "the whole point of the First Amendment is to protect speakers against unjustified government restrictions on speech, even when those restrictions reflect the will of the majority." *Id.* at 2828. As these cases make clear, there is no "will of the majority" exception to the Constitution.

Without even mentioning this long line of cases, the court of appeals read this Court's recent decision

in *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), to stand for the proposition that a majority of the people of a state could use the democratic process to single out same-sex couples for adverse treatment and deny them the right to marry. *DeBoer*, 772 F.3d at 409. *Schuette*, the court of appeals concluded, "applies with equal vigor here." *Id.* This is an unsupportable reading of *Schuette*, divorced from its context and inconsistent with its reasoning.

In *Schuette*, the Court held that the Fourteenth Amendment did not forbid the people of Michigan from amending their state constitution to ban the use of race in admissions in the state's public universities. Concluding that no fundamental right or invidious discrimination was involved, the majority held that the state's voters could properly amend their state constitution "as a basic exercise of their democratic power," rejecting the dissent's argument that the matter had to be left to the university's governing board. *Schuette*, 134 S. Ct. at 1636 (plurality opinion of Kennedy, J.); *id.* at 1646-47 (Scalia, J., concurring); *id.* at 1649-51 (Breyer, J., concurring).

Schuette is perfectly consistent with the first principles of constitutional supremacy and judicial review affirmed in *Lucas*, *Romer*, and *Arizona Free Enterprise*. Could the people of a state vote to segregate its public schools on the basis of race or deny the right to marry to mixed-race couples? Plainly not. As Justice Kennedy wrote in *Schuette*, "when hurt or injury is inflicted on racial minorities by the encouragement or command of laws or other state action, the Constitution requires redress by the courts." *Id.* at 1637.

That same principle applies equally where, as here, a state denies the right to marry to loving, committed same-sex couples, demeaning their relationships, stigmatizing their children, and denying them the full range of rights and benefits that states provide to married couples to ensure family integrity and security. As Justice Kennedy's opinion in *Windsor* makes clear, the constitutional guarantee of equal protection "withdraws from Government the power to degrade or demean," preventing states from acting to "disparage and to injure" gay and lesbian couples, deny their equal dignity, and treat their loving relationships as "less respected than others." 133 S. Ct. at 2695, 2696.

Under the Fourteenth Amendment, the majority cannot treat the members of a minority group as disfavored persons. The Fourteenth Amendment guarantees to all people—regardless of race, sexual orientation, or other group characteristics—equality of rights, including the fundamental right to marry. These protections are the "supreme Law of the Land," overriding laws enacted through the democratic process, whether adopted by state legislatures or by the voters. For that reason, it is constitutionally irrelevant that popular or legislative majorities may wish to consign same-sex couples to a second-class status.

Under any standard of review, no constitutionally acceptable rationale justifies a state's denial to gay men and lesbians the equal right to marry whomever they choose. As in *Windsor*, "no legitimate purpose overcomes the purpose and effect to disparage and to injure" same-sex couples in committed, loving relationships "whose moral and sexual choices the Constitution protects." 133 S. Ct. 2696, 2694. Far from furthering any state goals connected to marriage, the state laws at issue here disserve them, "humiliat[ing]

. . . thousands of children now being raised by same-sex couples" and "mak[ing] it even more difficult for the children to understand the integrity and closeness of their own family." *Id.* at 2694; *see also Kitchen v. Herbert*, 755 F.3d 1193, 1219-27 (10th Cir. 2014), *cert denied*, 135 S. Ct. 265 (2014); *Bostic v. Schaefer*, 760 F.3d 352, 380-84 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 308 (2014); *Baskin*, 766 F.3d at 656, 659-66; *Latta*, 771 F.3d at 468-74.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
DAVID H. GANS
JUDITH E. SCHAEFFER
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th St., NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

March 6, 2015

* Counsel of Record